

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

AMENDMENTS TO RULES OF PRACTICE

Docket No. RM2019-13

**COMMENTS OF THE UNITED STATES POSTAL SERVICE
IN RESPONSE TO THE PROPOSED RULES IN ORDER NO. 5229**
(November 1, 2019)

In Order No. 5229, the Postal Regulatory Commission (Commission) proposed amendments that would reorganize the order of appearance of its regulations in chapter III of title 39 of the Code of Federal Regulations (C.F.R.).¹ The proposed amendments also would substantially revise the Commission's Rules of General Applicability appearing in 39 C.F.R. part 3001 (Rules of Practice and Procedure), subpart A. As indicated in the corresponding Federal Register notice (84 Fed. Reg. 53840, October 8, 2019), deadlines were set of November 1, 2019, for the submission of initial comments regarding the proposed amendments, and November 15, 2019, for reply comments. The United States Postal Service (Postal Service) hereby submits its initial comments.

Overall, the Postal Service agrees that the evolutionary developments described on pages 3-9 of the Order, since the procedural rules were first adopted after enactment of the Postal Reorganization Act, clearly warrant reorganization of the current framework. The Postal Service further agrees that the new structure established by the instant set of proposals would amply fulfill the objective of a more orderly presentation of relevant material, and would undoubtedly improve the ability of persons appearing

¹ PRC Order No. 5229, Notice of Proposed Rulemaking to Amend the Commission's Rules of Practice and Procedure and to Reorganize its Regulations in the Code of Federal Regulations, Docket No. RM2019-13, September 13, 2019.

before the Commission to participate in Commission proceedings. Therefore, in large measure, the Postal Service supports the amendments as proposed. As described below, the comments of the Postal Service are limited to relatively minor suggestions and clarifications regarding the details of a few of the many provisions affected by the Commission's proposed amendments.²

A. Subchapter C, General Rules of Practice for Proceedings Before the Commission, Proposed Part 3010, Subpart A, General Provisions

In Subpart A of proposed Part 3010, the Commission proposes to add § 3010.101 which incorporates, and in some instances revises, the definitions that appear in current 39 C.F.R. § 3001.5.³ In proposed section 3010.101(f),⁴ the Commission incorporates a largely unchanged definition of "Negotiated Service Agreement."⁵ The Postal Service, however, advises that the revisions indicated below in strikethrough and underlined font should be made to this definition.

(f) *Negotiated service agreement* means a written contract, ~~to be in effect for a defined period of time,~~ between the Postal Service and a mailer or foreign postal operator, which provides for ~~customer-specific~~ rates or fees and/or terms of service not otherwise specified in the Mail Classification Schedule or an international law agreement in accordance with the terms and conditions of the contract. A rate ~~associated with~~ established only in a negotiated service agreement is not a rate of general applicability.

² The Postal Service provides, where feasible, its comments in legislative format.

³ Order No. 5229 at 24.

⁴ *Id.* at 83-84.

⁵ *Id.* at 24.

These revisions are necessary in order to align the definition of “negotiated service agreement” with the recent directives from the Commission in Order No. 5237.⁶ In this Order, the Commission specifically noted that “the Postal Service is able to enter into bilateral and multilateral agreements under 39 U.S.C. § 407(d) for the acceptance, processing, and delivery of Inbound EMS, Inbound Parcel Post, Inbound International Direct Mail—M-bags, and Inbound Letter Post Small Packets and Bulky Letters mailpieces at prices previously approved by the Commission.”⁷ Therefore, consistent with Order No. 5237, the addition of “not otherwise specified in the Mail Classification Schedule or an international law agreement” is essential to clarify the Postal Service’s authority to execute contracts with foreign posts as long as the rates are filed in a Commission docket.

Also, in Subpart A of proposed Part 3010, the Commission proposes to add § 3010.106(a) to describe the process for designating a presiding officer in Commission hearings.⁸ The Postal Service advises that the following revisions in underlined font should be made to this section.

(a) *Designation of presiding officers.* The Chairman, in consultation with all other Commissioners then in office, may designate any Commissioner, including the Chairman, to act as presiding officer over any matter before the Commission. Subject to approval by majority vote of all Commissioners then in office, the Chairman may also designate any member of the Commission’s staff, an Administrative Law Judge employed by the Commission for a specific proceeding, or any person under contract with the Commission to serve as presiding officer over any matter before

⁶ PRC Order No. 5237, Order Regarding Postal Service Request to Add Inbound Competitive Non-Published Rate Agreements with Foreign Postal Operators to the Competitive Product List, Docket Nos. MC2019-180 and CP2019-202, September 19, 2019.

⁷ *Id.* at 12.

⁸ Order No. 5229 at 27, 89.

the Commission. Any presiding officer must be a federal employee subject to applicable federal rules of ethical conduct.

Given that the Commission proposes to designate “any person under contract with the Commission to serve as presiding officer[,]” it is important to ensure that any such designated presiding officer is at a minimum a federal employee and is subject to the applicable federal rules of ethical conduct. This requirement should help avoid, for instance, a situation where a presiding officer has a conflict of interest in the cases over which he/she is assigned to preside.

B. Subchapter C, General Rules of Practice for Proceedings Before the Commission, Proposed Part 3010, Subpart B, Filing Requirements

In Subpart B of proposed Part 3010, the Commission proposes to add § 3010.120 which incorporates elements of current 39 C.F.R. §§ 3001.9(a), 3001.10(a), and 3001.11(a).⁹ The Commission notes that this proposed regulation “represents no change in current filing requirements.”¹⁰ Proposed § 3010.120(a)(2) states, “Confidential material filed under seal pursuant to part 3011 of this chapter shall not be transmitted electronically using the Filing Online system or any other electronic filing system unless authorized in advance by the Secretary.”¹¹ Subsequently, proposed § 3010.120(b) includes the sentence, “The Secretary has authority to approve the use of secure alternative electronic filing systems for confidential material filed under seal.”¹² The Postal Service suggests that the Commission consider adding “pursuant to

⁹ *Id.* at 28.

¹⁰ *Id.*

¹¹ *Id.* at 96.

¹² *Id.*

§ 3011.203(c)(2)” to the sentence. As background, proposed section 3011.203(c)(2) states the following:

(2) The Secretary of the Commission has authority to approve the use of a secure alternative system to file non-public materials. The Secretary may set forth any minimum requirements associated with using an alternative system. If a filer using the alternative system fails to comply with any of the Secretary’s requirements, the Secretary has discretion to revoke the filer’s eligibility to use the alternative system or impose requirements specific to the filer as necessary to ensure secure transmission of non-public materials.¹³

C. Subchapter C, General Rules of Practice for Proceedings Before the Commission, Proposed Part 3010, Subpart C, Participation in Commission Proceedings

Pursuant to 39 U.S.C. § 404(d)(5), the class of eligible persons or entities that may lodge an appeal of the discontinuance of a post office consists of persons “served by such office.” As a result, the current rule, 39 C.F.R. § 3025.14, does not accord standing directly to Postmasters, as they may not necessarily be within the class of those persons who are served by the post office. For this reason, the Postal Service recommends that proposed 39 C.F.R. § 3010.141(b)¹⁴ be modified to omit the word “Postmaster,” as indicated below in strikethrough and underlined font.

(b) Any other person served by the same post office under review who desires to participate in the proceeding, or any ~~Postmaster~~ counsel, agent, or other person authorized or recognized by the Postal Service as such person’s representative, may participate in an appeal by submitting comments.

This modification accords more closely with the statutory text.

¹³ See Non-Public Information [Docket No. RM2018-3; Order No. 4679], 83 Fed. Reg. 31258, 31283.

¹⁴ Order No. 5229 at 106.

D. Subchapter C, General Rules of Practice for Proceedings Before the Commission, Proposed Part 3010, Subpart D, Notices, Motions, and Information Requests

In Subpart D of proposed Part 3010, the Commission proposes to add § 3010.170 which incorporates, and in some instances revises, two current rules pertaining to Commission information requests that now appear in 39 C.F.R. §§ 3001.100 & 3001.101.¹⁵ The Commission suggests that these revisions include only “one significant revision,” which it describes as intended to encompass formal hearings within the information request rule.¹⁶ However, the proposed rule also contains another significant revision that should be amended in order to retain an important aspect of the current rules.

In proposed section 3010.170, subsection (a) states that information requests are to “assist the Commission in the conduct of its proceedings, in the preparation of its reports, or in the performance of its functions under title 39.”¹⁷ Subsection (b)(1) then states that information requests may be used to require the Postal Service “to provide any information, and associated documents or things in its possession or control, or any information, and any associated documents or things that it can obtain through reasonable effort and expense.”¹⁸ However, the Commission’s proposed rule in section 3010.170 would remove key language from the currently effective rule in section 3001.100(a)(1). Current rule 3001.100(a)(1) requires the production of information or documents “that are **likely to materially** assist the Commission” in the conduct of its

¹⁵ Order No. 5229 at 40-41, 116-18.

¹⁶ *Id.* at 40.

¹⁷ *Id.* at 116.

¹⁸ *Id.* at 116-17.

proceedings, in the preparation of its reports, or in the performance of its functions under title 39.¹⁹

The Commission does not explain, let alone seek to justify, the removal of that key language “likely to materially” in the proposed rule, and there is no basis to abandon the longstanding principle of materiality. Indeed, this language might simply have been inadvertently omitted when the current two rules were merged into the one new proposed rule, given that its removal is inconsistent with the retention in the proposed rule of similar language in another subsection of the proposed rule. In particular, in subsection (e) of proposed section 3010.170, the Commission retains the requirement from the current rules²⁰ that a movant requesting an information request demonstrate why the information is “relevant and material to the Commission’s duties under title 39.”²¹ There would be no reason for the Commission to require movants to demonstrate relevance and materiality if these elements were not needed to support the ultimate information requests themselves.²²

To amend the proposed rule so that it will retain these principles from the current rules, the Postal Service suggests that the revisions indicated below in strikethrough and underlined font should be made to proposed subsection 3010.170(b)(1).

¹⁹ 39 C.F.R. § 3001.100(a)(1) (emphasis added).

²⁰ 39 C.F.R. § 3001.101(b).

²¹ Order No. 5229 at 117.

²² Analogously, relevance and materiality are likewise longstanding principles constraining the scope of permissible discovery in litigation. See, e.g., Fed. R. Civ. P. 26(b)(1) (“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is **relevant** to any party’s claim or defense and **proportional to the needs of the case**, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”) (emphasis added).

(b) If likely to materially assist the Commission in performing its functions under title 39 of the United States Code, information requests may be used to:

(1) Require the Postal Service in any proceeding, or any party to a Commission hearing on the record, to provide any relevant and material information, and associated documents or things in its possession or control, or any relevant and material information, and any associated documents or things that it can obtain through reasonable effort and expense;

E. Subchapter E, Proposed Parts 3030 and 3045, Regulations Governing Market Dominant Products, Competitive Products, Product Lists, and Market Tests

The Postal Service also suggests that the Commission consider changes to proposed sections 3030.511(b)(2), 3030.565, and 3045.18. First, in proposed § 3030.511(b)(2),²³ “§ 3030.29” should be replaced by “§ 3030.529” as indicated below in strikethrough and underlined font.

(2) Whether the planned rate adjustments measured using the formula established in § 3030.523(c) are at or below the limitation established in ~~§ 3030.29~~ § 3030.529.

Second, in proposed § 3030.565,²⁴ it appears that the text of paragraph (b) should have been included in Order No. 5229, with “§ 3010.61(a)” replaced by “§ 3010.561(a)”, as indicated below in strikethrough and underlined font.

(b) The Commission will hold a public hearing on the Postal Service request. During the public hearing, responsible Postal Service officials will appear and respond under oath to questions from the Commissioners or their designees addressing previously identified aspects of the Postal Service’s request and the supporting information provided in response to the topics specified in ~~§ 3010.61(a)~~ § 3010.561(a).

Finally, in proposed § 3045.18,²⁵ it appears that portions of the text of paragraph

²³ *Id.* at 230.

²⁴ *Id.* at 237.

²⁵ *Id.* at 241. As background, see Amendments to Market Test Rules [Docket No. RM2018-12; Order No. 4973], 84 Fed. Reg. 974, 975-976.

(d) should have been included in Order No. 5229, with “§§ 3035.15 and 3035.16” replaced with “§§ 3045.15 and 3045.16” in both parts (d)(1)(i)(B) and (d)(2)(i)(B), as indicated below in strikethrough and underlined font.

(d) ***

(1)(i) ***

(B) The market test is expected to exceed any authorized limitation specified in ~~§§ 3035.15 and 3035.16~~ §§ 3045.15 and 3045.16 during any fiscal year, whichever is earlier.

(2)(i) ***

(B) The market test is expected to exceed any authorized limitation specified in ~~§§ 3035.15 and 3035.16~~ §§ 3045.15 and 3045.16 during any fiscal year, whichever is earlier.

Conclusion

The Postal Service agrees that reorganization of the rules of procedure will enhance the ability of interested parties to participate more effectively in Commission proceedings. The Postal Service views the amendments proposed by the Commission in Order No. 5229 as a substantial step in that direction, and proposes the additions and modifications outlined above to further this purpose. The Postal Service recommends,

therefore, that the Commission adopt the suggestions proposed by the Postal Service in these comments.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Anthony F. Alverno
Chief Counsel, Global Business & Service
Development

Eric P. Koetting
Mikhail Raykher

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1101
(202) 277-6333
November 1, 2019